UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ZACCHEUS KING,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 01-76-B-S
	)	
JEFFREY MERRILL, WARDEN,	)	
MAINE STATE PRISON,	)	
	)	
Respondent	)	

Recommended Decision on 28 U.S.C. § 2254 Motion

Habeas corpus petitioner Zaccheus King seeks relief from his 1996 conviction and sentence by the State of Maine for manslaughter, styling eleven ways in which his conviction and sentence run afoul of federal law. (Docket No. 1.) The State has answered, seeking dismissal of King's 28 U.S.C. § 2254 petition. (Docket No. 9.) I have already addressed a series of preliminary motions by King. I now recommend that the Court **DENY** King's § 2254 petition.

Procedural History

After his conviction for manslaughter by a jury on April 5, 1996, King filed a motion for acquittal or for a new trial on April 10, 1996. His trial attorney's June 11, 1996, motion to withdraw was granted with a new attorney appointed in advance of the scheduled July 1, 1996, sentencing. His motion to continue the sentencing and his motion for a new trial or for acquittal being denied, King was sentenced to twenty-five years, with all but eighteen years suspended, and six years of probation.

King appealed his conviction. The attorney representing him at the sentencing moved to withdraw as appellate counsel, which application was denied. In his direct appeal King challenged: (1) the denial of his motion to suppress statements that he made on the day of his arrest; (2) the trial court's instruction and re-instruction to the jury on accomplice liability; (3) the sufficiency of the evidence with respect to his manslaughter conviction; and (4) his basic sentence range of twenty to forty years. The Maine Supreme Judicial Court sitting as the Law Court affirmed King's conviction, Maine v. King, 1998 ME 60, 708 A.2d 1014, and entered a mandate on March 26, 1998. King did not petition the United States Supreme Court for a writ of certiorari.

Though King made an effort to secure state post-conviction review he ran into statute of limitations difficulty. Maine has a one-year statute of limitation for post-conviction review. See 15 M.R.S.A. § 2128(5). Absent affirmative relief from this stricture, King's time would have run on March 27, 1999. King filed a motion for additional time to file a post-conviction review petition on March 29, 1999. He filed his actual petition on April 23, 1999. The reviewing judge concluded that a hearing was necessary to determine whether the petition was barred because untimely. The State sought dismissal via a motion that was premised on the argument that the petition was filed outside the parameters of 15 M.R.S.A. § 2128(5). An attorney who was assigned to represent King argued that the doctrine of equitable tolling and the prisoner mailbox rule should apply to save King's petition. On April 14, 2000, the judge granted the State's motion to dismiss.[1] King filed a notice of appeal to the Law Court and it denied King a certificate of probable cause on June 14, 2000. The State concedes that King's 28 U.S.C. § 2254 petition is timely. See 28 U.S.C. § 2244(d)(1)(A).

[1] This ruling is discussed in greater detail below.

Grounds Raised

King, in his pro se, handwritten petition, takes issue with his conviction and sentence on eleven scores, seven of which assert ineffective assistance of counsel in violation of the Sixth Amendment protections on the part of two successive attorneys:

- Ineffective assistance of counsel in that his trial attorney was working as an agent for the District Attorney as demonstrated by his attorney's lack of action. King asserts this collusion-by-inaction deprived him the protection of the adversary trial system.
- Ineffective assistance of counsel because his attorney allowed a jury composed entirely of whites over the age of forty to sit in judgment over King, a black eighteen-year-old. King asserts that this violated a change of venue order. He also seems to argue that the defect was exacerbated by his attorney's failure to object to the admission of his juvenile records, even though there was a court order that barred the admission of this record.
- Ineffective assistance of counsel because his attorney failed to move to suppress hearsay testimony of jailhouse informers.
- Ineffective assistance of counsel because his attorney failed to investigate King's co-pre-trial detainees as possible witnesses that could have attacked the testimony of the jailhouse informers.
- Ineffective assistance of counsel because his attorney failed to file a petition for post-conviction review or to inform King that the petition must be filed within a certain time.
- Ineffective assistance of counsel because his attorney failed to challenge the court's decision to allow a juror to continue to sit on the jury after the juror's misconduct.
- Ineffective assistance of counsel because his attorney failed to object to improper jury instructions.
- Prosecutorial misconduct in that the District Attorney allowed the testimony of jailhouse informers who were paid by the District Attorney. The four paid informers gave testimony that contradicted the testimony of three eyewitnesses.
- Prosecutorial misconduct in that the District Attorney's closing argument was prejudicial.
- Insufficient evidence to sustain a manslaughter conviction because three eyewitnesses testified that King did not have a gun and did not enter the apartment. Further, no evidence was presented that linked King to the gun. And, furthermore, King's co-defendant admitted to shooting in self-defense.
- The twenty-five-year sentence, with all but eighteen-years suspended, is excessive for a manslaughter. The sentencing statute only allows such a sentence if the conduct falls within the heinous crime statute and King's conduct did not.

Discussion

I. *King's Non-reviewable Claims*

A. Maine's Post-conviction Review and the Federal Exhaustion Requirement

1. The Federal Exhaustion Requirement

Section 2254 of title 28 has strict inbuilt exhaustion requirements. It provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted unless it appears that --
>
> (A) the applicant has exhausted the remedies available in the courts of the [s]tate; or
>
> (B) (i) there is an absence of available [s]tate corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

§ 2254(b)(1). Subsection (c) requires a thoroughgoing presentation of each claim to the state's tribunals:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the [s]tate, within the meaning of this section, if he has the right under the law of the [s]tate to raise, by any available procedure, the question presented.

Id. at § 2254(c). See Rose v. Lundy, 455 U.S. 509, 520 (1982) ("[O]ur interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court."); Adelson v. DiPaola, 131 F.3d 259 (1st Cir. 1997) (discussing § 2254 exhaustion requirement).

2. Maine's post-conviction collateral review statutory scheme

Maine offers a comprehensive habeas or post-conviction review procedure. The governing statute defines its "purpose" broadly:

> This chapter provides a comprehensive and, except for direct appeals from a criminal judgment, the exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences. It is a remedy for illegal restraint and other impediments specified in section 2124 that have occurred directly or indirectly as a result of an illegal criminal judgment or post-sentencing proceeding. It replaces the remedies available pursuant to post-conviction habeas corpus.... The substantive extent of the remedy of post-conviction review is defined in this chapter and not defined in the remedies that it replaces; provided that this chapter provides and is construed to provide relief for those persons required to use this chapter as required by the Constitution of Maine, Article 1, Section 10.

15 M.R.S.A. § 2122 (West Supp. 2000).

A person who is in custody within the meaning of 15 M.R.S.A. § 2124 can challenge a criminal judgment or sentence as unlawful citing "any error or ground for relief, whether or not of record." 15 M.R.S.A. § 2125. However, post-conviction review is not available if the asserted error is "harmless," id., if the petitioner failed to exhaust his remedies in the trial court, on appeal, or administratively, id. § 2126, or if the petitioner has waived the ground(s) for relief, by not raising them in a single post-conviction review action, id. § 2128(3).[2]

One of the possible ways to waive post-conviction review in Maine is by not complying with the one-year statute of limitation for initiating a post-conviction petition for relief from a criminal judgment. Id. § 2128(5). "The limitation period runs from the latest of the following":

> (A) The date of final disposition of the direct appeal from the underlying criminal judgment or the expiration of the time for seeking the appeal;
> (B) The date on which the constitutional right, state or federal, asserted was initially recognized by the Law Court or the Supreme Court of the United States, if the right has been newly recognized by that highest court and made retroactively applicable to cases on collateral review; or
> (C) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

[2] This requirement it further tailored by the provisions of 15 M.R.S.A. §§ 2128(1) and (2).

Id. Under the Maine statute, it is King's burden to "demonstrate that relief is not unavailable on the basis of waiver as described in subsection[] ... 5." Id. § 2128.

B. King's Procedurally Defaulted Claims

1. Eight Claims Never Presented to the State Courts

I conclude that King's failure to advance eight of his eleven claims in a petition for state post-conviction review prevents him from doing so in this federal habeas petition. King has never presented these eight claims to a state tribunal and, thus, has not "exhausted" them as contemplated by 28 U.S.C. § 2254. It is also true that King may not be able to obtain further remedies in the state courts in order to "exhaust" these claims.[3] Though King took a direct appeal and did attempt to avail himself of the State's collateral review process, King never attempted to present five of his seven ineffective assistance of counsel claims, his two prosecutorial misconduct claims to the state courts, and any constitutional challenge to his sentence.[4] The Maine courts have not yet had a "fair opportunity to act on [these] claims." O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999). See also id. at 846. Maine's post-conviction statute being a 'long-arm' statute with

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[3] As the discussion below reveals, King is outside the basic one-year statute of limitations in 15 M.R.S.A. § 2128(5)(A). However, it is not for this court to determine at this juncture that these claims are permanently defaulted for purposes of state collateral review. Though the Maine court has rejected King's equitable tolling argument, the provisions of 15 M.R.S.A. §§ 2128(5)(B) and (C) could salvage some or all of these claims if King can so persuade the Maine courts.

[4] King did mount a nonconstitutional challenge to his sentence in his direct appeal. However, the habeas statute, 28 U.S.C. § 2254, contemplates federal habeas corpus relief for person, "in custody pursuant to the judgment of a [s]tate court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." King's challenge to his sentence in front of the Law Court was not framed as an Eighth Amendment cruel and unusual punishment claim, see Harmelin v. Michigan, 501 U.S. 957 (1991), nor did he protest that he was not given adequate process within the meaning of the Fourteenth Amendment. King's challenge before the Law Court was strictly to the factual determination made by the sentencing court's conclusion that his conduct was sufficiently "heinous and violent" to warrant placing the basic sentence in the twenty to forty year range. (Appellee Br. at 37-40.) Thus, as with seven of his other claims, he has procedurally defaulted a claim predicated on a constitutional infirmity.

regard to entertaining claims for habeas relief, 15 M.R.S.A. § 2122,[5] King's is a paradigmatic example of procedural default as to these eight constitutional claims.

2. King's Ineffective Assistance of Counsel Claim was Raised in his State Habeas But is Procedurally Defaulted on Independent and Adequate State Law Grounds

In his state habeas petition King did present a challenge to the judge's jury instruction, a challenge he made in his direct appeal to the Law Court. In his supporting facts he faulted his attorney for not objecting, stating that this "affected the fact finding function of the jury." (Pet. Post-Conviction Review at 3-4.) This must fairly be construed as an attempt to raise in the state court the seventh ineffective assistance claim made to this court: ineffective assistance of counsel because his attorney failed to object to an improper jury instruction. Because King attempted to bring this claim in his post-conviction petition, this is not a straightforward procedural default. Rather, this court must examine the state court's determination that King had procedurally defaulted this claim.

a. The superior court's order

In the eyes of the judge presiding over the evidentiary hearing on the timeliness of King's state post-conviction collateral review petition, King did not carry his 15 M.R.S.A. § 2128 burden. In its order dismissing King's petition, the Maine Superior Court considered the arguments advanced by King as grounds for relief from 15 M.R.S.A. § 2128(5)(A)'s one-year statute of limitation.[6] (Order Mot. Dismiss at 1.) The court observed that King's one-year time limit for filing his petition expired on March 26,

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[5] Maine takes a markedly different approach than did Illinois when enacting its habeas review procedure, analyzed by the majority and two dissents in O'Sullivan. See 526 U.S. at 843, 846-47. Because Maine has indicated its intent to consider a full array of claims in what is a one-final-stop post-conviction review, this case does not raise a concern about how many state hurdles must be cleared and corners turned in order to fully exhaust state remedies.

[6] At the evidentiary hearing the court heard the testimony of King and his "jailhouse lawyer." (Order Mot. Dismiss at 1 & n.1.)

1999. (Id. at 2.) It found that King met with his jailhouse lawyer, Leland Philbrick, in December of 1998 and that they discussed the statute of limitations and how it affected King's case. (Id.) However, Philbrick was transferred to a different correctional facility on January 6, 1999, prior to the completion of King's petition. (Id.) King filed his motion for an extension of time on March 29, 1999. (Id.) This motion was returned to King and King re-filed it on April 23, 1999, along with his petition. (Id.)

Observing that 15 M.R.S.A. § 2128(5) is not "jurisdictional" according to the Law Court (id. at 2-3, citing Diep v. State, 2000 ME 53, 748 A.2d 974), the court examined whether "equitable factors" warranted tolling the limitations period. (Id.) The court took guidance from federal law, reasoning that the Maine statute of limitations is modeled on federal habeas statutes of limitations. (Id.) Quoting Third and Eleventh Circuit precedent, the court stated that the reasons for the untimely filing must be extraordinary, and the delay must have been unavoidable and beyond the petitioner's control. (Id.) Furthermore, the petitioner must demonstrate that he or she was reasonably diligent in bringing the post-conviction claim(s). (Id.) The court concluded that King was sufficiently educated; that he had enough time during the year during which he had access to law books; that King was aware of the statute of limitations in December of 1998, well in advanced of March 26, 1999; and that he had two and a half months from the time his paralegal was transferred to find other legal assistance, noting that King offered no explanation why he found the replacement assistance only after the running of the statute of limitations. (Id. at 4.)

b. The state court's statute of limitation determination is an "independent and adequate state ground"

I cannot but conclude that the State has clearly and expressly rested its judgment dismissing King's efforts to get habeas review of this claim on a state procedural bar. Carsetti v. Maine, 932 F.2d 1007, 1009-10 (1st Cir. 1991). See generally Wainwright v. Sykes, 433 U.S. 72 (1977). This claim is very near the posture of the claims addressed by United States Supreme Court's Coleman v. Thompson, 501 U.S. 722 (1991). Coleman's federal habeas petition had seven claims that he had raised for the first time in his state habeas petition. Id. at 727-28. The state court denied this petition after hearing. Id. Like King, Coleman had inadvertently defaulted his entire state collateral review. See id. at 749.

The Coleman majority explained:

> We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds.

Id. at 729-30.

c. No grounds for relief from King's procedural default

King can be relieved of this independent and adequate state ground procedural default if he demonstrates cause and actual prejudice or that there has been a fundamental miscarriage of justice in the sense that he is actually innocent. Coleman, 501 U.S. at 744 – 51 (discussing cause and prejudice standard for procedurally defaulted § 2254 claims).[7]

[7] The Court declared:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas

King's claim is not one of "actual" or "factual" innocence in the sense that this exception has been applied by the Supreme Court. See Bousley v. United States, 523 U.S. 614, 623-24 (1998); Schlup v. Delo, 513 U.S. 298, 327-31 (1995); Sawyer v. Whitely, 505 U.S. 333, 339 (1992). He advances claims that are really ones of "legal innocence." Bousley, 523 U.S. at 624.[8] The only basis this record provides for establishing cause and prejudice is addressed immediately below in the context of the claim that King asserts as an independent ground for habeas relief: King's post-conviction attorney was ineffective in assuring King met the state's post-conviction statute of limitation.

C. King's Claim of Ineffective Assistance of Counsel in his Post-Conviction Proceedings

King could not have raised his claim that his attorney was ineffective in the pursuit of his state post-conviction collateral review in his state post-conviction petition because this claim arose as a result of that thwarted effort. Though it has not been procedurally defaulted in the manner his other claims have, King can make no headway here because of 28 U.S.C. § 2254(i) and United States Supreme Court precedent cut against him on this claim.

Subsection (i) of 28 U.S.C. § 2254 states: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a

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> review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Fay [v. Noia, 372 U.S. 391 (1963)] was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after Fay that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

501 U.S. at 750.

[8] The discussion of King's sufficiency of the evidence claim below supports the conclusion that King can not mount a claim to actual innocence: that in light of all the evidence it is more likely than not that no reasonable juror would have convicted him. Bousley, 523 U.S. at 623; Schlup, 513 U.S. at 327-28.

ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). If the statute's directive is not enough, the Supreme Court has held that once the petitioner has exhausted a direct appeal, there is no Sixth Amendment right to counsel for state collateral review. Pennsylvania v. Finley, 481 U.S. 551, 556-59 (1987). And, Coleman further drives the point home. For, Coleman also alleged that it was his attorney who erred in not filing a timely state habeas appeal. 501 U.S. at 752. The Court stated: "There is no constitutional right to an attorney in state-post conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Id. (citations omitted). The Court also noted that this ineffectiveness of counsel cannot be "cause" for relief from the procedural default because "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." Id. at 755.

II. King's Remaining Reviewable Claim: His Sufficiency of the Evidence Challenge

King claims that there was insufficient evidence to support his manslaughter conviction. King presented his sufficiency of the evidence challenge to Maine's Law Court in his direct appeal and thus it is preserved.

A challenge to the sufficiency of the evidence to sustain a criminal conviction has constitutional magnitude: "essential" to the due process guaranteed by the Fourteenth Amendment is the promise "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979); see also Roussel v. Corrections, Me.

Dept., 2001 WL 114980 (D. Me. 2001) (addressing sufficiency of the evidence challenge in a habeas petition). "The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson 333 U.S. at 318. This legal principle was "clearly established" at the time of King's conviction for purposes of this court's 28 U.S.C. § 2254(d)(1) review. I also note that this court's review of factual determinations made by the state courts is highly deferential. 28 U.S.C. § 2254(e)(1); see also id. § 2254(d)(2).

The Maine statute under which he was convicted provides that, "[a] person is guilty of manslaughter if that person," "[r]ecklessly, or with criminal negligence, causes the death of another human being" or if he"[i]ntentionally or knowingly causes the death of another human being," as with murder, but does so "while under the influence of extreme anger or extreme fear brought about by adequate provocation." 17-A M.R.S.A. §§ 203(1)(A),(B) (1983 & Supp. 1997). Maine's accomplice liability statute holds King liable as an accomplice in the commission of the crime if:

> (A) With the intent of promoting or facilitating the commission of the crime, he solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or committing the crime. A person is an accomplice under this subsection to any crime the commission of which was a reasonably foreseeable consequence of his conduct; or
> (B) His conduct is expressly declared by law to establish his complicity.

17-A M.R.S.A. § 57(3) (West 1983). See State v. Berry, 1998 ME 113, ¶ 9-12, 711 A.2d 142, 145-46 (discussing accomplice liability statute and the generation of evidence to support a jury instruction thereon). The record reveals that the State's theory and the court's instruction were targeted towards an accomplice liability theory.

The Law Court's opinion stated the facts undergirding King's conviction as follows:

> In the early morning hours of April 16, 1995, Juan Carlos Rodriquez, a crack cocaine dealer, was shot and killed in Lewiston. King, along with Joseph Jackson and Jeremiah Moore, was indicted for Rodriquez's murder pursuant to 17-A M.R.S.A. § 201(1)(A) (1983 & Supp.1997). ...
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> At King's trial numerous witnesses testified that the night before his death, Rodriquez had an argument with Jackson and/or Moore about a cocaine-for-marijuana trade. King was not involved in the argument, nor was he present during the incident. Sometime after midnight, however, he returned with Jackson, Moore, and a fourth man to the apartment where Rodriquez was staying. King, Jackson, and the fourth man entered the apartment building. After Jackson entered the apartment, he fired three or four shots into Rodriquez. Another shot was fired from behind Jackson.

King, 1998 ME 60, ¶¶ 2 –3, 708 A.2d at 1015. King admitted to being present in the apartment to an officer at a subsequent interview, and this statement came into evidence despite King's suppression efforts. Id. 1998 ME 60, ¶¶ 5-6, 708 A.2d at 1016.[9] In its discussion of King's challenge to his sentence the Law Court further observed: "King,

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[9] The King court references a "more detailed description of the events leading to Rodriguez's death in its decision disposing of King's two co-defendants' appeals, State v. Jackson, 1997 ME 174, 697 A.2d 1328. There the court recited the following facts:

> In the early morning hours of Sunday, April 16, 1995, Juan Carlos Rodriguez was shot and killed in Lewiston. For about three weeks prior to the shooting, Rodriguez had been dealing in crack cocaine in an apartment on Knox Street. The day before the killing, Jackson and Moore traded some marijuana with Rodriguez in return for a quantity of cocaine. Conflict developed among the parties when Rodriguez demanded the return of some of the cocaine because he felt he had been shortchanged. The conflict was resolved only when another person contributed some of his own cocaine to settle the dispute. Later that evening, Jackson and Moore smoked crack cocaine on at least two occasions. Nancy Dyment, who was with Jackson and Moore that night, testified that they spoke of "getting ripped off by a Dominican" and taking revenge.
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> After midnight Jackson and Moore drove to the apartment where Rodriguez was dealing. En route they picked up two more men. They parked the car and three of the men entered the apartment building. Alfred Palmer, who occupied the apartment where Rodriguez was dealing, allowed the men inside. Sometime after entering the apartment, Jackson brandished a handgun and moved toward Rodriguez, who was in the kitchen. Moore was behind Jackson at this time. A scuffle ensued. Rodriguez lunged at Jackson with a sharp object. Jackson fired three or four shots into Rodriguez. An additional shot was fired from behind Jackson. Rodriguez died as a result of the gunshot wounds.

Jackson, 1997 ME 174, ¶¶ 2-3, 1, 697 A.2d at 1330. King's name is not mentioned in this discussion.

likewise, voluntarily went to a known haven for drug activity and knew or should have known that trouble would likely develop." Id. 1998 ME 60, ¶ 15, 708 A.2d at 1018.

With respect to its ruling on this challenge the Law Court merely stated: "[T]he jury, based on the evidence viewed in the light most favorable to the State, could have rationally found beyond a reasonable doubt that King was an accomplice in the killing of Rodriquez." King, 1998 ME 60, ¶ 11, 708 A.2d at 1017 (citing State v. Barry, 495 A.2d 825, 826 (Me.1985)).

On its face, the Law Court seems to have rested its opinion only on the fact that King, while uninvolved in the earlier dispute between the victim and King's two co-defendants, "returned" with these discontents to the apartment where the victim was located. This is an action that, without more participation by and/or foreknowledge of King, would be a tenuous basis for his conviction. However, though the confirmation of the Law Court's terse conclusion requires extensive troweling through the trial transcripts I conclude that the Law Court's determination that there was sufficient evidence to support King's conviction is not clearly and convincingly "unreasonable."

A. The Trial

1. Forensic Evidence

There was evidence that three bullets were recovered from the body of the victim, Juan Carlos Rodriquez, a.k.a. Pedro Santana[10] and a total of five bullet casings were found on the scene. (Tr. at 22, 39, 47-50, 52, 60, 793, 774-75, 777-78, 794.) Rodriquez was shot four times, in the upper chest and upper abdomen. (Id. at 38, 46.)

[10] The autopsy evidence was presented to the jury in a poor quality video format. The court ordered that this be transcribed. The transcription was admitted into evidence. It is not included in the record before this court. However, King's claim does not require consideration of the content of that video or transcript.

Four of the casings were 25 caliber and the fifth a 380 caliber. (Id. at 775-76.) The 25 calibers were found spread around the scene, while the 380 caliber was underneath some trash behind a door. (Id. at 781, but see 810-12.) Additionally, there were two bullets lodged in the wall of the room in which Rodriquez was shot (id. at 61-62, 72-73), one a 25 caliber and one a 380 caliber (id. at 784-88.) Forensics determined that the two 25 caliber bullets found at the scene and the two in Rodriquez's body were fired from the same pistol. (Id. at 797-98.) On the recovered 25 clip's magazine they found a latent print that the fingerprint lab was not able to rule out being Jackson's (id. at 754-55), but could rule out as belonging to King. (Id. at 754-55, 758, 761.) Though the police recovered a slug from a 380 caliber pistol, they never matched it with a pistol. (Id. at 738, 807-08, 813.) It was not possible to determine when the 380 slug was fired into the wall. (Id. at 812.) The State's theory seemed to be that King might have been responsible for the 380 slug.[11]

Also part of the forensic evidence recovered was a skewer, poker, or shiskabob, found under a coffee table in the apartment where the shooting occurred. (Id. at 789.) A pager was found in the apartment entryway right next to the front door (id. at 790), with a number matching Jackson's (id. at 865). While hand swabs were taken off Jackson and Moore (id. at 816), no hand swab was taken off King (id. at 762-63, 816). A thorough search of King's and his cousin's houses the morning of the shooting turned up nothing – no guns and no drugs. (Id. at 905-06.)

[11] One witness spoke with King about guns within a week of the crime and King told the witness that he had a 380 and either a 22 or 25 (Id. at 109-10, 115-17.) King testified that he never spoke with this person let alone about obtaining a gun. (Id. at 1017, 1021.) He also testified that he did not have any such weapon at that time or at the time of the shooting. (Id. at 1018.)

2. Tempest Brewing

a. Moore and Jackson

Many witnesses testified as to their knowledge of King's co-defendants, Jeremiah Moore and Joseph Jackson hatching the conspiracy to take revenge on Rodriquez for a drug-related wrong. (see, e.g., id. at 145-48, 150-56, 159.) One acquaintance described the simple logistics of the revenge plan he overheard while hanging around with Moore and Jackson. One person was to knock on the door of the apartment of Alfred Palmer and Jill Polley, where Rodriquez was known to be dealing from. (Id. at 106.) Two other people with guns were to rush in. One person was to collect the money and drugs while the other two were to hold people down with guns. (Id. 106-07.) A fourth person was to be on lookout below. (Id. at 107.) The 'plans' were clearly made without King's involvement. (Id. at 106, 108-09, 111-15, see also id. at 160.)

There was evidence on this dispute that was brewing between Moore and Jackson and Rodriquez. Several witnesses testified about a confrontation. Third parties described how Jackson and Rodriquez had "a few words" the day of the shooting about a transaction involving the trading of marijuana for crack cocaine. (Id. at 128-33, 135-39, 334-38, 361-63, 465-66, 507, 624, 626-27.)[12]

b. Involving King

Both Jackson and King testified that they first met about a week and a half prior to the shooting. (Id. at 614, 990.) Jackson knew King was a crack dealer when Moore

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[12] Jackson testified that he first met Rodriquez on the day of the shooting when he went, for the second time that day in the late afternoon, to Rodriquez to buy crack for his personal use. (Id. at 615-17, 624-25.) Jackson described this dispute as generating "a little tension for a second." (Id. at 627.) Jackson denies that he threatened Rodriquez and that they exchanged other insults and accusations. (Id. at 627 -28.) Jackson testified that Moore and he spent the day drinking and getting high on crack. (Id. at 628-32.) He testified that there was a Domincan, who was not Rodriquez, who was sleeping with Moore's girlfriend and who might have been the subject of some discussion of non-lethal revenge. (Id. at 634.)

introduced them. (Id. at 614.) A female friend was driving in a car with Moore and Jackson during this interaction. (Id. at 259-61; 281-82.) While she was in the back seat Moore and Jackson asked King if he could get them "a piece." (Id. at 261, 282.) According to her Moore told King he "needed a piece because somebody was giving him a hard time." (Id. at 262.) King said something to the effect that he "could get him one." (Id. 262-63; 283.)[13] King left after about five minutes. (Id. at 263.)

Jackson testified that on Friday, the day before the shooting, Moore and Jackson approached King for some crack, asking King "for a couple rocks, pieces." (Id. at 618.) He recalls Moore saying that he "wanted a piece because he wanted to take care of someone." (Id. at 618-19.) He insisted that "a piece" did not refer to a gun. (Id. at 619.)

King testified about being called over to the Moore/Jackson car on this occasion. (Id. at 990-92, 1020-21.) He stated that Moore asked him if he knew where any pieces were. (Id. at 991, 1020-21.) King, a professed crack dealer, said he understood that Moore was seeking crack, responded that he didn't have any, and left. (Id. at 991-92, 1020-21.) King never heard words to the effect that someone needed a gun. (Id. at 992; see also 945.)

There was conflicting evidence on King's activities the evening of the shooting. Though there were some inconsistencies, King, King's cousin, his mother and common-law father, and his girlfriend told similar stories of King's action during the evening, none involving Jackson or Moore until sometime around 1:00 a.m. (Id. at 821, 822 -23,

[13] This witness admitted on cross-examination that when she testified just a few days after this meeting she did not remember whether King responded (id. at 283-84) and that it was hard to hear the conversation because of distractions (id. at 284-85).

826-29, 993.)[14] Jackson also stated that he did not have contact with King that day until immediately before the shooting. (Id. at 632, 638; see also 821.)

The State attempted to show that he had contact with Jackson and Moore, including beeper pages and visits to King's house. Alvin Houston, "somewhat" a friend of King's (id. at 187), stated that he and King packaged crack for sale at around 8:00 p.m. Saturday evening, each of them smoking some, (id. at 193-95, 204),[15] and said that King was paged by Moore or Jackson; at this point King indicated that they had been paging him earlier in the day (id.). King's mother stated that sometime during the late evening at home King went downstairs for a short period. (Id. at 699 – 700-01, 706; see also id. at 886, 892-93, 1026.) King stated that he did not go down to meet Moore or Jackson and explained that he was out in the hallway for ten minutes on a phone call to a good friend. (Id. at 997, 1026-27; see also id. at 926-27.)

c. Moore, Jackson, King, and Eirby meet up: Three different versions of the events

Though the individuals involved disagree on exactly how Moore and Jackson met up with King and his cousin, Drett Eirby, there was no dispute that the four were together in front of an apartment building at 1 Knox Street minutes before the shooting on Easter morning.

King testified that Moore and Jackson pulled up in front of the King house when he and Lowenstein were getting in her car to go to Drett Eirby's place. (Id. at 1000-01,

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[14] King testified that he met his girlfriend, Beth Lowenstein, at the mall around 8:30 p.m. (Id. at 995.) They visited his aunt's and then returned to his mother's apartment. (Id. at 995-96.) He stated that he did not have a gun at anytime. (Id. at 998-99.) King's mother's version of the night (id. at 698-99, 702-07) and Lowenstein's testimony corroborated King's (id. 163-70, 173). Lowenstein reports that she dropped him off at the house of King's cousin, Drett Eirby, between 1:00 and 1:15 am. (Id. at 168-69.) King also testified that they left his home at around 1:00 a.m., with Lowenstein driving, heading toward his cousin's. (Id. at 998, 1000, 1021.) To his family King appeared normal all evening. (Id. at 704-05, 707, 947-51, 957-58.)

[15] King testified that he was not a crack user and that he was at Eirby's at this time. (Id. at 993).

1021-22.) Moore asked if they could come over to Eirby's house and King responded, "'whatever.'" (Id. at 1001.) The two pairs proceeded to Eirby's in different cars (id. at 1022-23), Lowenstein left and King, Moore, and Jackson went inside and 'hung-out' for twenty-minutes. (Id. at 1001, 1023-24, 1027.) Then they decided they wanted to get some marijuana so they got in the car, King and Eirby sitting in the back. (Id. at 1001-02, 1028, 1044.) King testified that the four drove around downtown and then they stopped in front of 1 Knox Street and Jackson, Eirby, and King got out while Moore pulled off. (Id. at 1002, 1028.) Alfred Palmer, an individual known to all four, had a third floor apartment in this building and this was Jackson's choice of location to get the marijuana. (Id. at 1030.)

Jackson testified that he and Moore picked King up on the street outside of King's house in a chance encounter around 1:00ish and drove King over to Eirby's house where the four drank beer and smoked marijuana joints for about twenty minutes before leaving for Palmer's. (Id. at 639-43, 648.) Though the foursome did not discuss going to kill the Dominican during these refreshments, Jackson believed that his companions were aware that he had a gun, which he did indeed have, loaded with seven bullets. (Id. at 644-45, 647.) When Jackson hankered for an "oolie" and Eirby would not permit this crack/marijuana combination on his premises, Jackson, on the spur of the moment, set his mind on Palmer's place, saying "'Let's go over there and party for a while.'" (Id. at 648-50.) On the way over Moore drove the car, with King and Eirby sitting in the back seat. (Id. at 650.) At no time did they discuss "the Dominican." (Id. at 650.) They parked in a lot behind the alleyway next to Palmer's apartment. (Id. at 651-53.) Moore went to a

nearby store to buy beer to bring up while Jackson, King, and Eirby headed into the apartment building. (Id. at 651, 653.)

Eirby had a different version. He testified that King and Eirby went walking around 1:00 a.m. (id. at 852-53), ending up on the same street as the Palmer apartment (id. at 830, 852, 857). Jackson and Moore pulled up and told them that they were going to "a friend's house whatever," parked, and King and Eirby agreed to walk with them toward their friend's house. (Id. at 830 –32, 852-53, 857.) As the quartet walked they exchanged a few words, like, "'What's up?'" (Id. at 832.)

3. Accounts of the Shooting

a. King's, Eirby's, and Jackson's versions

King testified that when he went into 1 Knox Street he had a casual visit to the Palmer apartment in mind. When they arrived Jackson, King, and Eirby went into the apartment building, Jackson, first, running, then King, then Eirby. (Id. at 1002.) Jackson rang the buzzer and the three were let in the street level door. (Id. at 1002.) King knew it was Palmer's apartment and thought that they were going to get marijuana, talk, and party. (Id. at 1003, 1030.) King told Jackson that he would be up in a minute and Jackson proceeded up while King and Eirby stayed below to finish smoking a marijuana "blunt." (Id. at 1003, 1030.) King started to go up to follow in Jackson's footsteps and was on the second floor when the door above slammed open. (Id. at 1003, 1031.) He heard Palmer say something like, "'No man. You not going to do this[,]' [o]r 'You not got to do that.'" (Id. at 1003-04.) As King continued up he heard struggling and banging. (Id. at 1004.) When he was coming up the last set of stairs and got onto the third-floor landing, he heard several gunshots. (Id. at 1004, 1031) Palmer came out and

ran by King. (Id. at 1004, 1031-32.) King looked in the apartment and saw Jackson and Rodriquez struggling. (Id. at 1004, 1033.) He never made it completely inside the apartment. (Id. at 1032-33.) King saw that Jackson had a gun but did not see shots fired. (Id. at 1004, 1019, 1035.) He did not see Moore in the apartment though he was aware that there were others in the room. (Id. at 1033-35, 1048.) Surprised and scared, King turned and ran. (Id. at 1004-05, 1034, 1036.)

At no time prior to hearing the gunshots was King told that there had been an argument with Rodriquez over the crack/marijuana deal or that Moore and Jackson had a plan to rob or attack Rodriquez. (Id. at 1009-10, 1018-19, 1035-36.) He did at no time shoot a gun at this apartment. (Id. at 1018.)

Eirby's version had different details. King and Eirby, having walked to the Palmer apartment separately, were up against the exterior first-floor railing of the apartment smoking marijuana when Jackson and Moore approached the building. (Id. at 836, 853-54, 856.) Moore and Jackson said that they were going up into the apartment (id. at 832-33), and all four went in the building in discreet groups of two (id. at 833-5). King went in after Moore and Jackson were already upstairs and stood within the first floor. (Id. at 835.) King did not get a chance to go all the way upstairs before the shots were heard and King and Eirby ran out of the building. (Id. at 835-37, 846, 858-59, 862; but see 1031.) Eirby never left the first floor. (Id. at 835, 837.)

Jackson testified that he went up the stairs first and he wasn't sure what the order of people was behind him. (Id. at 654.) Jackson claimed that Moore was never in the building at the time of the shooting. (Id. at 651-52, 654-55, 680-81.)[16] Once admitted to

[16] In the early stages of the investigation Jackson had told a detective that Moore and Rodriquez had struggled in the Palmer apartment just prior to the shooting. (Id. at 655, 686, 688-89),

the third floor apartment Jackson approached Rodriquez to make it clear that he "didn't come back for him." (Id. at 658.) Rodriquez wanted him out and he had a poker in his hand. (Id. at 658-59.) When Jackson turned to find that Palmer, King, and Eirby were not behind him he pulled his gun to warn Rodriquez off. (Id. at 658-59.) Rodriquez lunged at Jackson; Jackson grabbed Rodriquez's arm; Rodriquez drove Jackson back to the wall; and Jackson fell. (Id. at 659.) Rodriquez was trying to grab the gun from Jackson's hand. (Id. at 660.) The gun went off three times during this struggle; the two were in unbreaking contact. (Id. at 661.) Jackson did not recall hearing a shot from behind him. (Id. at 662; but see 908.)

b. Eyewitness accounts: Variations on a theme

There were five other witnesses on hand at the Palmer apartment when the shooting occurred: Alfred Palmer; Palmer's girlfriend, Jill Dolley; Palmer's Brother, Bruce Palmer; Queancy Barefield who was heavily under the influence of crack and alcohol; and Michelle Descoteaux, who was attempting to barter with Palmer and Rodriquez for drugs. The details of their accounts of the shooting varied as to the manner in which Jackson entered the apartment, whether or not Moore ever entered the apartment, who struggled with whom, how many shots were heard, and whether or not Rodriquez was threatening towards Jackson. (See id. at 340-41, 344-52, 365-69, 386-95, 403-07, 409, 471-76, 478-79, 485, 508-20, 526-27, 530-37, 541-46; see also 656-57, 662.) Some of these witnesses never saw King and none of these witnesses provided an account that placed a gun in King's hand or otherwise implicated him in the actual shooting. (See id. at 348-49, 351, 368, 405-07, 409, 479, 512-13, 516, 543.)

A woman that lived in a first floor apartment at 1 Knox Street testified that from her living room window she saw three men, all wearing dark clothing, pass at a walk. (Id. at 226, 228, 235.) She got a glance of the sides of their faces; the first to pass appeared younger than the others. (Id. 226-27) The man in the middle had his hand tucked in his right pocket. (Id. at 227.) She did not know any of the three passer-byes. (Id. at 228.) She heard several sets of footsteps ascending the stairs. (Id. at 230.) "Very fast," within one or two minutes she heard three gunshots. (Id. at 231, 236.) She heard people running down the stairs but saw no one pass her windows. (Id. at 231, 235.)

Her friend that was with her also saw three figures pass, all black men. (Id. at 240, 242.) She could not tell whether one or all of them were young. (Id. at 240-41.) She heard more than one sets of footsteps going up the stairs. (Id. at 242.) She did not notice whether they were carrying anything in their hands. (Id.) She heard three gunshots, sounding more like a "pop" than a "boom." (Id.) She heard footsteps running back down the stairs. (Id.) She saw what she assumed were the same three men coming back heading towards an abutting alleyway. (Id. at 243-44, 247.) She saw "something" in the jacket of the man that was ahead of the other two men, a "young black male walking pretty fast"; or she assumed there was something in there because his right hand was in the left side of his jacket. (Id. at 244, 247 -49.) She did not recognize and could not identify any of the three men. (Id. at 244.)

One witness, an acquaintance of Moore's, was staying in a building on Knox Street very near 1 Knox Street. She testified that she saw a car go by five or ten minutes before she heard gunshots. (Id. at 270.) Jackson was driving. (Id. at 271.) The car pulled into an alleyway. (Id. at 272.) She saw three people emerge from the alleyway and

recognized Jackson, and someone she took to be King. (Id.)[17] She testified that she was "not positive" it was King but he had King's jacket on and her brother said it was King. (Id. at 273, 285.) Jackson lead the way with King and someone she did not recognize, but was sure was not Moore, following. (Id. at 273, 288.) She saw the trio go towards 1 Knox Street, though she did not actually see them go in through the door. (Id. at 273-74.) She heard four gunshots – three quick ones, a pause, and then a fourth. (Id. at 274.) She came out of the apartment. (Id. at 278.) Next she witnessed the same three people coming out the door and running into the alley, King and the unidentified third person in the lead. (Id. at 275-76.) She saw them go into the alleyway and did not notice anything in their hands. (Id. at 275.) Jackson trailed the other two by a couple of seconds. (Id. at 275-76.)

4. After the fact

There was considerable evidence about the 'get away'[18] and how Moore, Jackson, Eirby, and King acted immediately after the shooting.[19] Alvin Houston who was

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[17] King testified that he never walked up the alleyway. (Id. at 1029-30.)

[18] Jackson testified that after he left the building he met up with Moore who was coming towards the building to check on him because King and Eirby had told him what had happened. (Id. at 664.) He got into the passenger seat while Moore drove and King and Eirby were in the back seat. (Id. at 665.) He handed the gun to King, or Eirby, and asked King to get rid of it. (Id. at 665, 672, 675.) Jackson testified : "[King] said he popped him, or was going to pop him. I thought he said he popped him, but there was no way he could have." (Id. at 666; see also id. at 667-70.) Jackson testified that though he knew that King carried a gun, or was "strapped," and might be carrying one in his bandana, he did not see him with a second gun that evening. (Id. at 676-779.)

King said he met Eirby on the second landing and they ran out together out the front of the building, out, and down the street. (Id. at 1005, 1036-38.) Eirby and King agreed to split up and meet back at Eirby's; King does not remember getting picked up by Moore and Jackson or seeing Jackson after the shooting. (Id. at 1005, 1037-41, 1048.) He never told Jackson that he "popped" Rodriquez. (Id. at 1005.)

Eirby testified that he ran to the end of the alleyway with King "right" behind him, and they got picked up by Moore in the car. (Id. at 838 -41.) At this juncture he sees Jackson coming out of the building with blood all over his shirt. (Id. 838, 840-42, 844, 862.) When Jackson got into the car he "started going on about how he had shot somebody." (Id. at 839, 844.) Eirby saw that Jackson had something silvery, like a gun in his shirt. (Id. at 842 –43.) Eirby never saw King with a gun during the night (id. at 859) and did not see Jackson give a gun to King after the shooting. (Id. at 844.) King and Eirby got out of the car (id. at 841, 844 –45), and went separate ways (id at 845.) (See also 397-400, 410-11.)

allegedly bagging drugs with King earlier in the afternoon, testified that Moore and Jackson showed up at his house at sometime around 1:00 a.m. and made statements such as: "'We smoked that bastard.'" (Id. at 208, 217); "'Al we got him. We got that Puerto Rican bastard.'" (Id. at 198); and "'We shot him.'" (Id. at 198; see also id. at 208.) Moore said, "I'm not sure if he's dead or not." (Id. at 199.) Both Jackson and Moore claimed that they shot Rodriquez. (Id.) Jackson was acting particularly "hyper," "wired up," and "pretty much more or less bragging." (Id. at 207 -08.) This witness was clear that both the co-defendants claimed to have shot Rodriquez. (Id. at 208.) King's name never came up. (Id.)[20]

A jailhouse 'roommate,' James Birkbeck, said King "bragged about" the authorities finding bullets to his 380 or 38 gun. (Id. at 314.) King said that he and two others planned to dress in dark clothing and "go do this." (Id. at 314, 318.) King said that the others got mad at him because he wore cream-colored pants and did not wear sufficiently dark clothing. (Id. at 318, 320-21.) King described how he and Eirby got into the car of Jackson and Moore and drove to the apartment building in question. (Id. at 314.) Moore, King, and Eirby jumped out while Jackson parked the car. (Id.) Next, Moore, King and Eirby went up the front stairs while Jackson, the witness guessed, went up the back. (Id.)

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[19] King reported that when he and Eirby got back to his house, they were wired and Eirby was very nervous; at this point King made a call to Lowenstein, not revealing what had transpired. (Id. at 1006, 1008, 1042-43.) After hanging out a little with Eirby, King then called another female friend and spoke with her for a couple of hours, again not mentioning the events of the night (Id. at 1008-09, 1042-44.) This friend testified that she had a three-hour phone call with King on the morning of the shooting, starting around 1:00 a.m. and during which King was falling asleep. (Id. at 926-30, 933-39.)

According to King's girlfriend he called her at 1:45-2:00 a.m. from Eirby's house to assure she was home safe, and he said something in the background to Eirby about one of his codefendants and generally sounded a "little suspicious." (Id. at 171-72, 177, see also id. at 845.)

[20] Houston pieced together the information he heard after the shooting (some of which he garnered while in jail with Moore, Jackson, and King) and concluded that Moore went up the back stairs, through the fire escape, and, as the second gunman, shot Rodriquez in the hip and the head. (Id. at 211-12, 214-15, 217.) He believed that King had gone up the front way with Jackson. (Id. at 212.) He also stated that Jackson told him that he owed his life to King. (Id. at 215.)

"[T]hey all met upstairs, and that's when they took him out." (Id.) King reported that "they all shot" and that King had "shot the dude after he was already dead." (Id. at 31-19.)[21] King told Birkbeck that King anticipated getting off because the police failed to test for gunpowder residue on his hands and clothing. (Id. at 315.) Birkbeck reported that, as Birkbeck and Jackson were at odds with each other, King encouraged him to provide false testimony against Jackson -- something to the effect that Jackson was planning on pinning things on King and that Moore forced King at gunpoint into going along with the robbery. (Id. at 315-16, 319.)

A block mate of King following King's arrest, Scott Jaynes (id. at 570-71, see also id. at 602), who was previously a stranger to King, testified that he overheard a telephone call that King made around 7:00 p.m. on April 16. (Id. at 572-73 see also id. at 601, 603-08.) King said: "'Drett – Drett, you know, you got to let them know that I was with you all night. ... Make sure I was with you. I was with you. Keep the story the same that I was with you, didn't go up to that house, and get rid of it. It's got my prints on it. Get rid of it.'" (Id. at 573-74; see also id. at 587.) Jaynes assumed King was talking about a gun because King said, "'It's got my prints on it. You can get another one. Get one from Bubba.'" (Id. at 574.) He told Eirby to remember that the story had to be that neither King nor Eirby was in the house. (Id. at 587.) Jaynes thought King denoted that the time that needed to be attested to was 11:00 p.m. until 2:00 a.m. (Id. at 573-74.) King also referred to Moore as, "'Stupid A—Jeremiah." (Id. at 574-75, 582.) King

[21] Birkbeck testified that King told him that Jackson owed his life to King but King did not explain what he meant by this statement. (Id. at 305, 307.) During this "cell mate[]" chat King said something to the effect that Jackson "'done it'." (Id. at 207.) King denied having said that Jackson owed him his life. (Id. at 1016-17.) See footnote 20.

denies that he called Eirby at this juncture. (Id. at 1015-16.)[22] He did not use the phone to urge anyone to get rid of anything. (Id. at 1016.)

Jaynes describes how in conversation the next morning King's description of his involvement in the shooting changed from a shear denial that he was even there: "First he said he wasn't even in the walk way. ... Then he wasn't on the stairs in the house. The more we talked, the more further up in the house he got. He was talking like he was first. He's at the door, you know, and then he's in the living room, and then he's right there, right on the scene he ended up telling me." (Id. at 576; but see id. at 903-04.) Once King started talking about more than one gun this witness goaded King about the fact that the police might find or might already have found the other gun. (Id. at 576-77; see also id. at 910-12.) King retorted that the police had not got the guns. (Id. at 577.) When furthered goaded by the suggestion that the authorities could do a test within a couple of days on King's hands to determine if he shot one of the guns, King "backs up and starts looking at his hands. He's, you know, concerned he shot a gun, and he asks me, he says, 'Well can they tell'... 'Well, can they tell two or three days later?'" (Id. at 577.)

Jaynes recorded what he had overheard and was told by King in a letter to his attorney dated on April 17, the Monday following the Sunday morning shooting (id. at 578-80, 591-92, 592), and it was recorded by the jail in a log on April 18 (id. at 597-99), and date stamped by his attorney's office on April 20 (id. at 592-93).

Jaynes later quizzed King on what Rodriquez's last words were. (Id. at 580-81.) King told him that King's "buddy" pulled out the gun, Rodriquez pleaded that he didn't

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[22] There was defense testimony that King did not place a call to Eirby at this time but had spent time on the phone, via a collect call, with a household of three sisters who were all friends with King. (See, e.g., id. at 915-22, 930-33, 939.) There was evidence that an approximately eight-minute call was placed to their number at the time identified by King's block-mate as being the time King spoke with Eirby. (See id. at 923, 931, 939-40.)

need to do that while backing into the kitchen, and then "'Pop.'" (Id. at 581.) King told him that it wasn't King's bullet that hit him, that he hadn't shot Rodriquez. (Id. at 581, 589.) King also said that Jackson was going to take all the blame. (Id. at 582.)

In a video-taped interview by a detective later in the morning of the shooting, that King failed to get suppressed, King first insisted he was with his girlfriend all night and was seeing her off and showering during the time of the shooting, (id. at 867- 70), and was never at 1 Knox Street (id. at 896). Well into the interview he allowed that Moore, Jackson, and Eirby picked him up; the four went to the apartment building; Jackson and Moore went up; and King never got further than the entryway banister before he heard shots. (Id. at 871.) He was but a "downstairs" witness. (Id. at 899-900.) Next King said that all four were "in" the apartment but that he and Eirby were on the stairs, walking up, with Moore and Jackson upstairs, when they heard shots. (Id. at 871-72, 900.) Still further into the interview King admitted to being at the door of Palmer's apartment when Jackson forced his way into the apartment; King heard someone say, "'No. No. Don't do that'"; King saw Jackson wrestling with someone and he saw a gun; and King ran. (Id. at 872, 885, 900, 902.) King later admitted that his girlfriend had dropped him off at Eirby's at 1:00 a.m. (Id. at 873.) King also told the detective that he was scared of Jackson and Moore and feared that they might do something to him. (Id. at 873-75.) King said that he knew nothing about a gun and took no part in disposing of Jackson's gun. (Id. at 875-76.) The jury viewed an edited and condensed thirty-five minute video of the four-hour interview. (Id. at 876-84.)[23]

[23] There was some attention during the trial to the impact that King's common-law father had on this interview, as he came in and out of the room over the course – King wanting him present and the officers wanting him out.

B. The Legal Merits of King's Sufficiency Challenge

King argues that the evidence is not sufficient to support his manslaughter conviction because three eyewitnesses testified that he did not have a gun and did not actually enter the apartment. He also emphasizes that there was no evidence linking him to the gun. What is more, Jackson admitted that he shot Rodriquez in self-defense.

The transcripts do bear out that Jackson was much more involved, emotionally and perhaps physically, in the brewing dispute and fatal confrontation than was King. However, there is ample evidence of King's involvement in the separate sequence of events that lead to the shooting. King's conviction as an accomplice is not dependent on his having handled or fired a gun or his relative location on the stairwell (or the apartment's threshold) at the time the shots were fired. The jury was instructed that King was guilty as an accomplice if he aided, agreed to aid, or attempted to aid Jackson in planning or committing a crime -- be it robbery, assault, or murder -- and that the shooting death was "a reasonably foreseeable consequence of his conduct." 17-A M.R.S.A. § 57(3). (See Tr. at 1072-93; see id. at 1100-02.)

The fact that evidence was controverted by King[24] and that he professed ignorance of any knowledge that Moore and/or Jackson had any other intention than just hanging around and getting marijuana when entering the Palmer apartment does not mean that the jury's verdict to the contrary is invalid. It is the jury's responsibility to sift through

[24] The evidence before the jury was conflicting and many of the witnesses were on the wrong side of the law and heavily involved with drugs when the shooting occurred. Some, perhaps most, of the witnesses were facing state charges that might act as leverage for their information and testimony (id. at 309-10, 317-18, 320-21, 582 –83, 682-89, 692); some key eye-witnesses changed their stories over the course of the investigation, many at first falsely stating they were not present at the shooting (id. at 357, 401-03, 407-09, 487-88, 518-19, 849-52, 855, 860-62, 893-94), or altering other details about the events leading up to and during the shooting (id. at 486-87, 489-90, 640-41, 654-55, 661-62, 667-72, 676-78, 894); some had extensive criminal histories (id. at 310-11, 568-70, 583-86, 692-93); and some used the shooting as an opportunity to take Rodriquez's crack and sell and/or use it. (id. at 358-59, 369, 480-81, 484.) King, too, admitted that he changed his story dramatically. (Id. at 1011-14, 1024-25, 1043, 1049-50.)

competing version of facts and varying gradations of credibility, and draw reasonable inferences. See United States v. Saccoccia, 58 F.3d 754, 782 (1st Cir. 1995). As the First Circuit stated in Saccoccia:

> A different standard of review takes center stage when a defendant challenges the sufficiency of the evidence supporting his conviction. In that connection, the inquiry turns on whether, "after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." United States v. O'Brien, 14 F.3d 703, 706 (1st Cir.1994). In performing the requisite analysis, we do not assess the credibility of witnesses, see id., nor do we force the government to disprove every reasonable hypothesis of innocence, see United States v. Echeverri, 982 F.2d 675, 677 (1st Cir.1993).

Id. at 773-74 (addressing a sufficiency of the evidence challenge on a direct appeal).

Though King's hypothesis of innocence might be credible, a rational factfinder could also conclude that the State proved its case against King as an accomplice. I cannot conclude that the affirmance of King's conviction by the Law Court was "contrary to" or "involved an unreasonable application of" the Fourteenth Amendment due process standard for sufficiency of the evidence challenges articulated in Jackson. King has certainly not met his 28 U.S.C. § 2254(d)(1) burden.

Conclusion

For the forgoing reasons I recommend the King's petition for habeas relief be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Margaret J. Kravchuk
United States Magistrate Judge

November 28, 2001.

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-76 ADMIN

KING v. WARDEN, MSP Filed: 04/12/01

Assigned to: Judge GEORGE Z. SINGAL

Demand: $0,000 Nature of Suit: 530

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

ZACCHEUS KING ZACCHEUS KING

plaintiff [COR LD NTC] [PRO SE]

MCI WARREN, BOX A, THOMASTON, ME 04861

v.

WARDEN, MSP WILLIAM R. STOKES

defendant 289-3661 [COR LD NTC]

ASSISTANT ATTORNEY GENERAL, STATE HOUSE STATION 6

AUGUSTA, ME 04333-0006 626-8800